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IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. 544

ARTHUR H. SHAFFER and M. JAMES SPITZER,
Trustees,
Petitioners,

versus

C. GORDON ANDERSON, as Trustee in
Reorganization,
Respondent.

REPLY BRIEF FOR PETITIONERS (IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI)

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No. 544

ARTHUR H. SHAFFER and M. JAMES SPITZER, Trustees,

Petitioners,

v.

C. GORDON ANDERSON, as Trustee in Reorganization,

Respondent.

REPLY BRIEF FOR PETITIONERS

I

Respondents have constructed their position on a non-existent foundation; there is no adjudication by the District Court, nor any competent evidence of record to warrant an adjudication, that the trustee's investigation report is correct in any respect or that the plan is unfair or inequitable.

The opposing briefs are premised upon the same erroneous hypothesis, that is, that the trustee's investigation report "disclosed" and "established" "facts" that "rendered the plan unfair", permitting confirmation to be vacated "in an exercise of (the Court's) inherent equitable power sitting in bankruptcy". These are self-adjudicated

conclusions of respondents, not of the District Court. The briefs do not challenge, nor could they, that:

> none of the so-called "facts" was ever determined to be a fact by the District Court;
>
> no hearings in a judicial sense were ever conducted by the District Court to ascertain whether or not the allegations are facts; no trial was held, no testimony was adduced, no evidence was presented, not even the inadmissible material on which the trustee's report is purportedly based;
>
> when the District Court vacated confirmation of the plan it had never read nor even seen the material on which the trustee's report is supposed to be based, the bulk of which was not on file months after the Court acted;
>
> the District Court explicitly disclaimed that "anything" adverse to petitioners had been found or concluded;
>
> the District Court has not held the plan to be unfair or inequitable, or anything more than that the Trustee's report discloses facts that "*in the opinion of the Trustee* render the plan not fair and equitable";
>
> of record, undisturbed, is an order of the District Court vacating a prior order (that authorized the filing and referral to a Special Master of objections to petitioners' claim), for the expressed reason that "the matters which were to be resolved by the Special Master were amicably resolved" (pet. for cert., pp. 5-8).

The trustee and the SEC, in an effort to blunt the impact of these incontrovertible facts, urge—quite erroneously—that petitioners did not oppose the substance of the investigation report, but only the legal sufficiency of the facts to justify the recommendations (tr. br., pp. 9-10; SEC br., pp. 8-9). The report not being a pleading, re-

quired no answer, but petitioners, in order to make their position unmistakably clear, responded separately, to the trustee's applications for the preliminary and final orders of revocation (298-304, 317-322). In addition to raising all the defenses recited in the petition for certiorari (p. 6), the answers challenged the legal sufficiency of the report (304), and also attacked it as "contrary to the evidence" (298), and "disput(ed) the correctness of all conclusions and conclusory statements and a substantial portion of the purported factual statements * * * insofar as they bear upon the Caplan mortgages" (302). None of the issues were tried.

Hence it follows that the holding of the Court of Appeals and the argument of respondents that a confirmed plan, not substantially consummated, may be vacated "for good cause shown" are without application herein. The District Court neither found, nor had competent evidence before it on which to adjudicate, that there was good cause or any other cause to vacate confirmation of the plan.

II

The issue is whether § 229 authorizes, at any time prior to substantial consummation, revocation of a confirmed plan of reorganization and repudiation of a settlement fully performed by one party. On this point, which has wide application in reorganization proceedings, the Court below is in conflict with other Circuits.

Respondents do not recognize that involved herein is both the vacating of a confirmed plan of reorganization as well as the repudiating of a compromise settlement, which the trustee and the Court induced petitioners fully to perform. The position of respondents parallels the holding of the Court below that under § 229 there are no recogniz-

able rights or equities in respect of either the settlement or the plan until the latter has been substantially consummated.

That concept has been analyzed in the petition for certiorari (pp. 9-19).

As shown above, the District Court could not in the present posture of this case have properly exercised equity power, if it had any, and accordingly the Court of Appeals found it necessary to alter § 229 from its legislative purpose of establishing a bar time, into an authorization to vacate a confirmed plan of reorganization and divest established rights. The trustee's brief echoes that position, which is in direct conflict with *Inland, Knight, et al.*

The trustee inaccurately argues that "*Inland* has nothing to do with Sec. 229" (p. 7). The essence of the SEC brief therein (in support of the petition for certiorari), was specifically that § 229, in conjunction with § 222, authorized a material modification of a confirmed plan and that a more compelling case for the exercise of such power would be difficult to visualize. The petition was denied. By coincidence, counsel for Allied Assets Corp. herein below also appeared for respondent in *Inland*, stating there that the main contention of petitioners therein derived from § 229 and argued that it did not authorize a material post-confirmation modification tantamount to a new plan; prudently, to avoid a conflicting stand, Allied Assets Corp.'s counsel filed no opposing brief herein.

Pfister v. *Finance Corp.*, 317 U. S. 144, relied on by the SEC (p. 8) and cited in the petition for certiorari (p. 16) holds that the right of bankruptcy courts to affect prior orders is "subject to intervening rights" (p. 152).

Respondents justify the trustee's "change (of) mind" (tr. br., p. 3) on the inapplicable theory of newly discovered evidence. They studiously ignore that all material now alluded to was previously available and specifically

brought to their attention (pet. for cert., pp. 7-8). § 57k (cited by SEC, p. 10) as well as the concept of reconsideration for newly discovered evidence are unavailable if the means of obtaining the evidence were previously in the possession of applicant or available to him through the exercise of diligence.[1]

III

Petitioners have been irreparably prejudiced.

The trustee repeatedly argues that respondents have not been adversely affected (pp. 2, 6, 10).

The facts are that petitioners have lost and cannot be restored to the position occupied when induced by the trustee to discontinue their appeal, which, if prosecuted, might have resulted in petitioners obtaining possession of the vessels or the proceeds of sale. That there was a reasonable likelihood of such result, was in effect attested to by the trustee, who swore that he and his counsel invited petitioners to a conference and proposed the very plan of reorganization that he now criticizes, "for the purpose of persuading (petitioners) not to prosecute an appeal" (appendix to Allied Assets Corp., br. below, pp. 16M, 20M). In contrast to what would or might have been, petitioners have collected nothing, and have been subjected to great and continuing expense. Furthermore, one of the four mortgaged vessels was then under lucrative charter, which has been permitted to terminate, and the trustee has sold the ship; another vessel was severely damaged and sold for salvage, with the funds collected by the trustee, etc. (Appendix below, pp. 3a-5a, 9a-12a, 14a; 29, 371-378).

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[1] *In Re El Dorado Ice & Coal Co.*, 280 Fed. 180, 181; *Nichols v. Alker*, 231 F. 2d 208 cert. den. 352 U. S. 829; *In Re Shell Metal Products, Inc.*, 19 F. Supp. 785; *State Central Savings Bank v. Hemmy*, 77 F. 2d 458, 459; *Remington, Bankruptcy*, vol. 2, § 1038, p. 492; § 1038.50, p. 493; *U. S. v. Branson*, 142 F. 2d 232.

CONCLUSION

The petition for writ of certiorari should be allowed.

Dated: December 19, 1961.

Respectfully submitted,

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